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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROGER TOWERS,  
  
                                Petitioner,  
  
                v.  
  
SUPERIOR COURT, COUNTY OF  
STANISLAUS,  
  
                                Respondent.

Case No. 1:20-cv-00411-NONE-HBK

ORDER ADOPTING FINDINGS AND  
RECOMMENDATIONS, DENYING  
PETITIONER’S MOTION FOR SUMMARY  
JUDGMENT, DENYING PETITION FOR  
WRIT OF HABEAS CORPUS, DIRECTING  
CLERK OF COURT TO ASSIGN DISTRICT  
JUDGE AND CLOSE CASE, AND  
DECLINING TO ISSUE CERTIFICATE OF  
APPEALABILITY

(Doc. Nos. 1, 19, 26)

Petitioner Roger Towers, who is currently on probation following his conviction in state court, is proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Doc. No. 1.) On October 29, 2018, petitioner pleaded *nolo contendere* in Stanislaus County Superior Court to misdemeanor possession of a firearm and ammunition in violation of a civil restraining order and was sentenced to four days in jail and thirty-six months of “informal” probation. (*Id.* at 1.) When the pending petition for federal habeas relief was filed in this court on March 20, 2020, the matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

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1 On April 1, 2021, the assigned magistrate judge issued findings and recommendations  
2 recommending that petitioner's motion for summary judgment be denied and that the habeas  
3 petition be denied on the merits. (Doc. Nos. 19, 26.) The pending findings and recommendations  
4 were served on petitioner at his address of record and contained notice that any objections thereto  
5 were to be filed within thirty (30) days of service. (*Id.* at 8.) On April 23, 2021, petitioner filed  
6 objections to the findings and recommendations. (Doc. No. 27.)

7 In his objections, petitioner first argues that his motion for summary judgment is  
8 necessary and appropriately brought. However, as explained in the findings and  
9 recommendations, "[b]ecause the Court's analysis of the merits of a habeas petition is equivalent  
10 to a summary judgment motion, '[m]otions for summary judgment are inappropriate in federal  
11 habeas cases.'" (See Doc. No. 26 at 5 (quoting *Rizzolo v. Puentes*, No. 1:19-cv-00290-SKO  
12 (HC), 2019 WL 1229772, at \*1 (E.D. Cal. Mar. 15, 2019); *Johnson v. Siebel*, Case No. EDCV  
13 15-277 CBM (AFM), 2015 WL 9664958, at \*1 n.2 (C.D. Cal. Aug. 4, 2015)).) Second, in his  
14 pending petition, petitioner challenges the validity of the underlying state court issued restraining  
15 order, arguing that it violated his rights under the First and Fourteenth Amendments of the U.S.  
16 Constitution. (See Doc. Nos. 1 at 13; 27 at 2.) However, petitioner is not "in custody" as a result  
17 of that restraining order. Instead, he is currently on probation for possession of a firearm and  
18 ammunition in violation of the restraining order. See 28 U.S.C. § 2254(a) (stating that a district  
19 court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody  
20 pursuant to the judgment of a State court . . ."); *Rouse v. Plummer*, No. C 04-0276 JF (PR), 2006  
21 WL 3507945, at \*5 (N.D. Cal. Dec. 1, 2006) ("[B]ecause Petitioner is not 'in custody' as a result  
22 of the underlying restraining order, he cannot challenge the validity of that order."). The court  
23 can only consider challenges to petitioner's criminal conviction, but petitioner does not raise any  
24 such challenges here. Accordingly, the pending findings and recommendations correctly  
25 concluded that "[b]ecause [petitioner] is not 'in custody,' constructive or otherwise, as a result of  
26 the civil restraining order, he cannot challenge the validity of the restraining order in this habeas  
27 proceeding." (Doc. No. 26 at 6.)

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1           Petitioner next argues that the magistrate judge erred in concluding that his *nolo*  
2 *contendere* plea bars habeas relief (Doc. No. 27 at 3). Contrary to petitioner’s assertion, the  
3 magistrate judge did not recommend denial of the pending petition based solely on the nature of  
4 his plea. Rather, the magistrate judge correctly explained that, “to the extent [plaintiff] challenges  
5 his conviction for possession of a firearm and ammunition in violation of his civil protection  
6 order,” any challenge to his *nolo contendere* plea is “limited to challenging the voluntary and  
7 intelligent character of the plea or his counsel’s ineffectiveness in advising the petitioner to enter  
8 a plea,” neither of which petitioner raises here. (Doc. No. 26 at 7 (citing *Tollett v. Henderson*,  
9 411 U.S. 258, 267 (1973).)

10           Finally, petitioner asserts that respondent’s record is “both incomplete and fraudulent,”  
11 specifically contending that respondent withheld pages and deleted statements from petitioner’s  
12 state habeas petitions and what he characterizes as “a fraudulent probation agreement.” (Doc. No.  
13 27 at 5.) As noted in the findings and recommendations, however, petitioner provided the  
14 allegedly missing pages in his reply to respondent’s answer and those documents are therefore  
15 before this court. (*See* Doc. Nos. 24 at 26–77; 26 at 7 n.5.)

16           In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), the court has conducted a  
17 *de novo* review of the case. Having carefully reviewed the entire file, including petitioner’s  
18 objections, the court concludes that the findings and recommendations are supported by the  
19 record and by proper analysis.

20           Having determined that petitioner is not entitled to habeas relief, the court now turns to  
21 whether a certificate of appealability should issue. The federal rules governing habeas cases  
22 brought by state prisoners require a district court issuing an order denying a habeas petition to  
23 either grant or deny therein a certificate of appealability. *See* Rules Governing § 2254 Case, Rule  
24 11(a). A prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal, rather an  
25 appeal is only allowed in certain circumstances. *Miller-El v. Cockrell*, 537 U.S. 322, 335–36  
26 (2003); *see* 28 U.S.C. § 2253(c)(1)(A) (permitting habeas appeals from state prisoners only with a  
27 certificate of appealability). A judge shall grant a certificate of appealability “only if the  
28 applicant has made a substantial showing of the denial of a constitutional right,” 28 U.S.C.

1 § 2253(c)(2), and the certificate must indicate which issues satisfy this standard, 28 U.S.C.  
2 § 2253(c)(3). In the present case, the court finds that reasonable jurists would not find the court's  
3 rejection of petitioner's claims to be debatable or conclude that the petition should proceed  
4 further. Moreover, it appears at this time that any alleged error has been corrected by his release.  
5 Thus, the court declines to issue a certificate of appealability.

6 Accordingly:

- 7 1. The findings and recommendations issued on April 1, 2021 (Doc. No. 26), are  
8 adopted in full;
- 9 2. Petitioner's motion for summary judgment (Doc. No. 19) is denied;
- 10 3. The petition for writ of habeas corpus (Doc. No. 1) is dismissed;
- 11 4. The court declines to issue a certificate of appealability; and
- 12 5. The clerk of court is directed to assign a district judge to this case for the purpose  
13 of closing the case and then to close the case.

14 IT IS SO ORDERED.

15 Dated: **June 18, 2021**

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18 UNITED STATES DISTRICT JUDGE  
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